BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: JEROME B., Claimant, vs. SAN GABRIEL POMONA REGIONAL CENTER, Service Agency.	OAH No. L 2006090138

DECISION

This matter was heard by Mark E. Harman, Administrative Law Judge (ALJ) of the Office of Administrative Hearings (OAH), in Pomona, California, on October 26, and December 19, 2006.

G. Daniela Martinez (Martinez), Fair Hearing Program Manager, represented San Gabriel Pomona Regional Center (Service Agency).

Jerome B. (Claimant), who was not present, was represented by Betty H., his aunt and legal guardian. Eric Johnson (Johnson), a family facilitator for Hathaway-Sycamores Connections,[1] assisted Betty H.

Claimant seeks a determination that he is eligible for services under the Lanterman Developmental Disabilities Services Act (the Act) based on a diagnosis of mental retardation or, in the alternative, on the basis of having a disabling condition closely related to mental retardation or requiring treatment similar to that needed by

[1] Hathaway-Sycamores is a private, non-profit, community-based mental health and welfare agency. It operates the Connections "wraparound" program, which provides individualized services to special needs children and their families. Building upon existing family support networks, it "wraps" services around the child and family, by linking them with child welfare, health, mental health, educational and juvenile justice service providers to develop comprehensive support and service plans that enable children to live in their communities.

people with mental retardation (commonly referred to as the "fifth category"). The Service Agency contends that testing of Claimant's cognitive abilities has shown that Claimant does not have mental retardation or any other qualifying condition, and therefore, Claimant is not eligible for services.

The parties presented oral and documentary evidence. On the second day of the hearing, near the conclusion of the Service Agency's case-in-chief, a city-wide electrical power outage resulted in shutting down the digital audio recording equipment. Without means to continue making an audio record of the hearing, the parties agreed that further testimony was not needed, but that the record would remain open until January 16, 2007, to allow the parties the opportunity to submit additional documentary evidence (in particular, a medical report of examination regarding Claimant), and until January 23, 2007, to allow the parties to respond or object to the newly submitted evidence, if any.

Because the ALJ had not received Claimant's medical report, on January 17, 2007, an OAH staff person telephoned the Service Agency and left a voice message with Martinez, seeking to find out whether she had received anything from Claimant. On January 18, 2007, Johnson left a message on the ALJ's telephone stating that Betty H. needed a continuance to file the medical report. On January 19, 2007, the ALJ issued a Notice of Ex Parte Communication and Order, by which Betty H. was instructed to submit either a written request for an extension of time to file the report, or submit the report, itself, no later than January 26, 2007. On January 26, 2007, Johnson sent by facsimile, Betty H.'s written request for a "30 to 60 day extension in order to get all appropriate paperwork in to assist with your decision." Attached to this request was a letter from Cesar Gomez, MSW, a community-based therapist for Five Acres, a provider of children and family mental health services, who is providing individual counseling services to Claimant. Mr. Gomez stated that he was seeking updated testing for Claimant to assess his psychological and cognitive functioning, which may take four to six weeks to become available for review. An OAH staff person faxed these requests to Martinez. The letters, and proof of service on the Service Agency, were marked for identification as Claimant's Exhibit 2. On January 29, 2007, the Service Agency objected to Betty H.'s request for a 30 to 60 day extension of time to obtain and submit additional reports.

Having considered the written request of Betty H., along with Mr. Gomez's letter, and the objection of the Service Agency, the ALJ has denied Claimant's request for an extension of time to offer additional reports. Rather than gathering additional reports, it appears Claimant is seeking more time to undergo a new assessment of his cognitive functioning. That assessment would go beyond the issues pertinent to his current request for eligibility and the scope of these proceedings.

At the administrative hearing, the ALJ deferred a ruling on the admissibility of Exhibit H, offered by the Service Agency. Exhibit H was admitted.

On January 29, 2007, the record was closed and the matter was submitted for decision.

ISSUE

Does Claimant have a developmental disability that makes him eligible for services provided by the Service Agency under the Act, which is found at Welfare and Institutions Code[2] section 4500 et seq.?

FACTUAL FINDINGS

1. Claimant is a 14-year-old boy who lives with his paternal aunt and legal guardian, along with his two brothers. Through his legal guardian, he applied for services in March 2006 based on an eligible condition of mental retardation. Claimant did not assert he had autism, cerebral palsy, or epilepsy. The Service Agency denied Claimant's request on August 8, 2006. Claimant requested a fair hearing to appeal the Service Agency's determination, and this matter ensued.

2. When Claimant was approximately 18 months old, the juvenile dependency court asserted jurisdiction over him. The court removed him and his two older brothers from his parents' custody due to allegations of abandonment and neglect associated with his parents' substance abuse. Claimant was extremely malnourished and was briefly hospitalized. Soon thereafter, the court placed him and his brothers with their aunt, Betty H., who has cared for them, and with whom they have resided ever since. Betty H. reported that, when Claimant arrived, he did not say a single word for a whole year, sat in one spot, would not move, and would not play or smile.

3. Claimant received early intervention services from the Service Agency as an at-risk toddler. At age three, he applied for services under the Act. In July 1995, a psychological evaluation was performed by a Service Agency vendor, Frank J. Trankina, Ph.D. (Trankina), a clinical psychologist. Dr. Trankina administered the Stanford-Binet Intelligence Scale, Form L-M. The result of this testing was an overall IQ score of 81, which is at the low end of the low-average range of functioning. Dr. Trankina found a significant language delay, and recommended special education and speech therapy. The Service Agency denied Claimant's request for services because the cognitive testing did not suggest mental retardation.

4. Also in 1995, for an unknown reason, the Monrovia Unified School District (District) determined Claimant was not eligible for special education services. He was held back in kindergarten for one year and, at age seven, while he was attending a special education first grade classroom, the District performed another assessment. The District's assessment team determined that Claimant was "functioning well below social, emotional, cognitive, and adaptive norms for his age. Observations by school personnel, Pacific Clinics and [Claimant's aunt] indicate overall functionality at the 2-4 year age range." (Exhibit K.) His special day class teacher reported that he had a short attention

[2] All further references are to the Welfare and Institutions Code, unless specified otherwise.

span, had difficulty understanding and following directions, and often did not comprehend tasks on an age appropriate level. He made noises on a regular basis which were distracting to the other students in the classroom. Betty H. reported that Claimant was unable to care for basic everyday needs, such as dressing himself or following simple directions. Age equivalency in the socialization domains was at the 1.8 level. The assessment team concluded Claimant was "significantly behind in all domains of his life," met all criteria of a specific learning disability, and was qualified as an individual with exceptional needs warranting a special education program.[3]

5. Claimant's court-appointed special advocate, Ms. Barbara Hodges, sought an eligibility determination from the Service Agency on behalf of Claimant in 2001. Dr. Trankina again performed the psychological evaluation on behalf of the Service Agency. Dr. Trankina administered the Wechsler Intelligence Scale for Children-Third Edition (WISC-III) and the Vineland Adaptive Behavior Scales (VABS). On the WISC-III, Claimant received a verbal IQ score of 88 and a performance score of 71, with a full scale IQ score of 77. Dr. Trankina noted: "There is considerable discrepancy between the verbal and performance scores, with a 17 point difference. A difference of 15 or more is statistically significant and normally indicates that there is some factor impeding functioning. This is most likely a learning disability factor affecting visual motor integration and learning. There was also behavioral difficulty with Jerome having much problem with maintaining attention and focus. This matter appeared significant enough to interfere with overall learning and adaptive functioning." On the VABS, Claimant received a score of 89 for Daily Living Skills (high limit of low-average) and 77 for Socialization (higher end of the borderline range). Two possible factors noted by Dr. Trankina affecting Claimant's performance on the tests were depression, suggested by his general mood and approach to tasks and relationships; and attention and focus difficulty. In August 2001, the Service Agency again denied Claimant's request for services because the results of his cognitive testing placed him in the low average range of intelligence.

6. Claimant was receiving mental health services for several years to address behavioral issues, hygiene, and self-care skills, including weekly individual therapy through Five Acres, a child and family services agency that provides mental health services. He made progress in his self-care treatment goals, but he regressed in skills after transferring to a new clinician in January 2005. In January 2005, Claimant began receiving services through Hathaway-Sycamores Connections, a wrap-around program providing services to children with special needs and their families. In October 2005, Claimant's clinician referred him for a psychological consultation secondary to symptoms of "talking to himself and staring into space." In November 2005, Rochelle Lee, Psy.D. (Lee), Postdoctoral Fellow, Department of Psychological Services,

[3] The District's 1999 assessment report indicates that the Regional Center had performed another psychological evaluation of Claimant on November 13, 1998, and further, had diagnosed Claimant as follows: Disorder of Childhood, Sleep Terror Disorder, Borderline Intellectual Functioning, Learning Disorder, Not Otherwise Specified. The Service Agency did not offer this evaluation report at the fair hearing.

Hathaway-Sycamores Child and Family Services, conducted a psychological evaluation of Claimant, who at the time was 13 years, five months old.

7. In her report, Dr. Lee stated that Claimant had a history of sexual acting out, aggression, mood lability, and oppositionality. She also stated that Claimant previously had been diagnosed with Intermittent Explosive Disorder, Disruptive Behavior Disorder, and a Learning Disability. Dr. Lee sought to clarify these diagnoses and provide recommendations for continued treatment. She administered the WISC-IV, which resulted in an overall score of 63. She reported that Claimant possessed severe deficits across all cognitive domains including crystallized and fluid reasoning abilities. Dr. Lee's diagnosis was as follows:

Axis I:	300.4	Dysthymic Disorder, early Onset
	307.7	Encopresis, Without Constipation and Overflow Incontinence, By History
	307.6	Enuresis (Not Due to General Medical Condition), By History
Axis II:	317	Mental Retardation, Mild – Moderate Severity
Axis III:		Seizures (Controlled by medication)
Axis IV:		Problems with Primary Support; Educational Problems; Psychosocial and Environmental Problems
Axis V:		Current = 45 – 55

8. Dr. Lee interviewed Ms. Galliver, the teacher of Claimant's seventh grade special day class. Ms. Galliver reported that even with a high degree of structure in her classroom, Claimant was among the most disruptive students, frequently exhibiting "verbal outbursts, attention seeking behaviors, talkativeness, impulsiveness, poor follow-through, and fooling around. Without constant supervision [Claimant] is reportedly 'out of control.'" (Exhibit C.) In Claimant's March 2006 individualized education program, the District psychologist reported test results showing that Claimant's non-verbal intellectual reasoning was in the average range, his verbal comprehension was in the borderline to low-average range, there was a significant discrepancy between his ability and achievement in all areas, and he exhibited indications of a processing disorder in the area of attention and cognitive abilities.

9. Betty H. is most concerned that Claimant will not be able to take care of himself when he reaches adulthood. She testified at the administrative hearing that he often does not respond at all to her instructions. She can only direct him to do one task at a time, and he needs prompts at every step to perform tasks. Every week, Betty H. gets reports from his school about him failing to turn in his homework. He does not have

social skills and does not know how to make friends. Claimant often stares off into space and is non-responsive for periods lasting between 15 seconds and four hours. In 2002, Ronald S. Gabriel, M.D., a neurologist, prescribed Concerta (used to treat attention deficit disorder) and clonodine for Claimant, but neither of these was effective in treating Claimant's disruptive and non-responsive behaviors. In June 2005, Dr. Gabriel prescribed Risperdal, an anti-psychotic drug, to alleviate Claimant's episodes.

10. The Service Agency's current determination that Claimant does not have a developmental disability is based largely on the report of Edward G. Frey, Ph.D. (Frey), a licensed clinical psychologist who evaluated Claimant on June 13, 2006. Dr. Frey reported that Claimant was a pleasant fellow, who interacted well with him during the clinical interview, and appeared motivated to perform well on the testing. Dr. Frey administered the WISC-IV, which resulted in a full scale IQ score of 88, within the average range. Claimant did well in most all composite areas with the exception of verbal comprehension (score = 67), which was his weakest area. In terms of academics, Claimant had low average to borderline skills. Dr. Frey opined that the select deficit in verbal comprehension "is probably more related to learning disability factors than to any sort of global cognitive delay." Dr. Frey's diagnostic impression was:

Axis I:	799.90	Diagnosis deferred to treating mental health professionals (probable depressive type disorder, rule out psychotic features)
Axis II:	V71.09	No diagnosis on Axis II
Axis III	Defer to history and physical	

11. Dr. Frey administered the VABS-II, a measure of adaptive functioning. Betty H. acted as informant. Claimant's scores on the VABS-II were:

Communication Domain	57
Daily Living Skills	59
Socialization	55
Adaptive Behavior Composite	56

In his testimony at the administrative hearing, Dr. Frey conceded that Claimant's scores on the VABS-II were significantly low, but he believed Claimant's adaptive delays were not related to mental retardation, because his adaptive delays could not be traced back to any intellectual impairment. He wrote in his report: "The etiologies of these adaptive delays appear to be psychiatric and behavioral in nature." Dr. Frey also opined that his observations and testing of Claimant did not support a conclusion that Claimant met any criteria of the "fifth category." He cited as further support Claimant's previous testing showing low average to borderline intellectual functioning. Dr. Frey conceded that he did not know what, precisely, was causing Claimant's maladaptive behaviors.

12. When asked to explain the difference between scores from the intelligence tests he administered and those reported by Dr. Lee, he said it was more probable that the lower scores were erroneous than it was probable that the higher scores were erroneous. Dr. Frey said that scores on IQ tests vary depending on the examinee's mood and motivation, and that a false high score is harder to achieve than a false low score. For example, people taking the test may be depressed and respond: "I do not know," or "Don't ask me that question." But typically, a person cannot guess correctly to get high scores. Also, the results of Dr. Trankina's evaluations, and the District psychologist's report, showing Claimant to have low-average intellectual functioning, were fairly consistent with Dr. Frey's results. Finally, even though a period of only seven months had elapsed since Dr. Lee's testing, Dr. Frey did not believe that the significant difference in scores (63 versus 88) was caused by the so-called "practice effect," which, he believed, could result in, at most, a four-point rise in Claimant's scores.

LEGAL CONCLUSIONS

1. Claimant has the burden of proof as to each fact necessary to establish his eligibility for services provided by the Service Agency. (Evid. Code 500.)

2. Section 4512, subdivision (a), states:

> (a) "Developmental disability" means a disability that originates before an individual attains age 18 years, continues, or can be expected to continue, indefinitely, and constitutes a substantial disability for that individual. As defined by the Director of Developmental Services, in consultation with the Superintendent of Public Instruction, this term shall include mental retardation, cerebral palsy, epilepsy, and autism. This term shall also include disabling conditions found to be closely related to mental retardation or to require treatment similar to that required for individuals with mental retardation, but shall not include other handicapping conditions that are solely physical in nature.

3. Section 4512, subdivision (*l*), in relevant part states:

> (*l*) "Substantial disability" means the existence of significant functional limitations in three or more of the following areas of major life activity as determined by a regional center, and as appropriate to the age of the person:
>
> (1) Self-care.
> (2) Receptive and expressive language.
> (3) Learning.
> (4) Mobility.
> (5) Self-direction

(6) Capacity for independent living.
(7) Economic self-sufficiency.

4. In this case, Claimant asserts that he has mental retardation, or in the alternative, a condition closely related to mental retardation, or a condition which requires treatment similar to treatment required for individuals with mental retardation. Claimant has been evaluated on at least four occasions since he was three years old. Each time, standardized testing for intellectual functioning has been administered, and the resulting scores in three out of these four tests, including the most recent test administered by Dr. Frey, has indicated that Claimant is at least in the low average to borderline range of intellectual functioning.

5. The Diagnostic and Statistical Manual of Mental Disorders (4th edition, Text Revision 2000) (DSM-IV-TR), describes mental retardation as follows:

> The essential feature of Mental Retardation is significantly subaverage general intellectual functioning (Criterion A) that is accompanied by significant limitations in adaptive functioning in at least two of the following skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety (Criterion B). The onset must occur before age 18 years (Criterion C). Mental Retardation has many different etiologies and may be seen as a final common pathway of various pathological processes that affect the functioning of the central nervous system.
>
> *General intellectual functioning* is defined by the intelligence quotient (IQ or IQ-equivalent) obtained by assessment with one or more of the standardized, individually administered intelligence tests (e.g., Wechsler Intelligence Scales for Children—Revised, Stanford-Binet, Kaufman Assessment Battery for Children). Significantly subaverage intellectual functioning is defined as an IQ of about 70 or below (approximately 2 standard deviations below the mean). It should be noted that there is a measurement error of approximately 5 points in assessing IQ, although this may vary from instrument to instrument (e.g., a Wechsler IQ of 70 is considered to represent a range of 65-75). Thus, it is possible to diagnose Mental Retardation in individuals with IQs between 70 and 75 who exhibit significant deficits in adaptive behavior. Conversely, Mental Retardation would not be diagnosed in an individual with an IQ lower than 70 if there are no significant deficits or impairments in adaptive functioning. . . . When there is significant scatter in the subtest scores, the profile of strengths and weaknesses, rather than the mathematically derived full-scale IQ, will more accurately reflect the person's learning abilities. When there is a marked discrepancy across verbal and performance scores, averaging to obtain a full-scale IQ score can be misleading.

> Impairments in adaptive functioning, rather than a low IQ are usually the presenting symptoms in individuals with Mental Retardation. *Adaptive functioning* refers to how effectively individuals cope with common life demands and how well they meet the standards of personal independence expected of someone in their particular age group, sociocultural background, and community setting. Adaptive functioning may be influenced by various factors, including education, motivation, personality characteristics, social and vocational opportunities, and the mental disorders and general medical conditions that may coexist with Mental Retardation. Problems in adaptation are more likely to improve with remedial efforts than is the cognitive IQ, which tends to remain a more stable attribute.

(DSM-IV-TR, pages 39 - 42.)

6. The record here fails to establish a concrete diagnosis of Claimant's condition, although it appears to be in the nature of a psychiatric disorder, a learning disability, some combination of these, or even something else related to Claimant's early childhood trauma. It is clear that Claimant's condition has yet to be satisfactorily treated by Claimant's clinicians. It is also clear that Claimant's condition causes substantial impairment of Claimant's functioning in the areas of language, learning, self-care, self-direction, economic self-sufficiency, and capacity for independent living.

Although Claimant has established that he has significant functional limitations in these areas, almost all of the testing indicates that Claimant's disabling condition, and consequent impairments in adaptive functioning, is most closely related to learning disabilities or psychiatric problems. Claimant has not established that his impairments are the consequence of global delays in cognitive abilities, which is necessary to establish that he has mild mental retardation, or even a condition closely related to mental retardation. Further, Claimant, on this record, has failed to establish that he requires treatment similar to treatment required for individuals with mental retardation.

At this time, Claimant is not eligible for the services provided by the Service Agency.

ORDER

Claimant's appeal of the Service Agency's determination that he is not eligible for services is denied.

Dated:_____ _____

MARK E. HARMAN
Administrative Law Judge
Office of Administrative Hearings

NOTICE

This is the final administrative decision in this matter and both parties are bound by this Decision. Either party may appeal this Decision to a court of competent jurisdiction within 90 days.